Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DOUGLAS CAMPBELL, et al.,
Petitioners,

v.

VICTORIA BUCKLEY, in her official capacity as Secretary of State for the State of Colorado and as a member of the Colorado State Initiative and Referendum Title Board, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PAUL GRANT *
ATTORNEY AT LAW
6426 S. QUEBEC STREET
ENGLEWOOD, CO 80111
(303) 771-1908

Counsel for Petitioners

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED

I. May Colorado's state government exercise prior restraint on the rights of its citizens to advocate political change through citizen initiatives, by regulating the content of their proposals for change, where the regulatory scheme employed invests a title setting board and state courts with arbitrary and discretionary authority to prevent any proposed measure from being presented as a petition to voters for discussion and signing before placement on the ballot.

II. Can a trial court dismiss parties for lack of standing, after accepting the parties' stipulation to standing at trial.

LIST OF PARTIES and CORPORATE DISCLOSURE STATEMENT

Petitioners:

Douglas Campbell, Richard Hamilton, Clyde Harkins, Jack Hawkins, Daniel Hayes, Gary Swing, Jeffrey Wright, Douglas Bruce, The Initiative and Referendum Institute, Americans For Sound Public Policy, and the American Constitutional Law Foundation, Inc.

Petitioners Initiative and Referendum Institute, Americans for Sound Public Policy, and the American Constitutional Law Foundation, Inc., are all non-profit political organizations with no parent corporations and no stockholders.

Respondents:

Victoria Buckley, in her official capacity as Secretary of State for the State of Colorado and member of the Colorado State Initiative and Referendum Title Board, Colorado State Initiative and Referendum Title Board, and Rebecca Lennahan and Richard Westfall, in their official capacities as Title Board members

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The opinion of the Tenth Circuit Court of Appeals is reported at 203 F.3d 738 (10th Cir. 2000) (App. A). The District Court decision is reported at 11 F.Supp.2d 1260 (D. Colo. 2000) (App. C).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101 and 2106. The opinion of the Tenth Circuit was issued on February 10, 2000. (App. A). Petitioners filed their request for extension of time to file a petition for rehearing on February 24, 2000, and on March 2, 2000, the Court granted an extension until March 7, 2000. A timely Petition for Rehearing and Petition for Rehearing En Banc was filed on March 7, 2000. The petition for rehearing and the petition for rehearing en banc were denied on March 17, 2000. (App. D).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. I; U. S. Const., amend. XIV, Section 1.; Colo. Const. art. V, sec. 1(5), sec. 1(5.5); and § 1-40-105, Colo. Rev. Stat. (1999); § 1-40-106, Colo. Rev. Stat. (1999); § 1-40-106.5, Colo. Rev. Stat. (1999); § 1-40-107, Colo. Rev. Stat. (1999). The texts of these provisions are provided in Appendix E.

STATEMENT OF THE FACTS

Colorado voters in 1910 adopted a constitutional amendment, Colo. Const. Art. V, Sec. 1, providing for citizens to exercise the reserved legislative powers of direct legislation through initiative and referendum. Implementing legislation was passed in 1913. Since 1913, Colorado citizens have initiated roughly 65 bills or constitutional amendments which were passed into law.

In 1994, the Colorado General Assembly placed on the ballot a referendum for a constitutional amendment, Colo. Const. Art. V, Sec. 1(5.5) (which voters adopted), providing that citizen initiatives would be subject to a newly restrictive state-administered title setting process, where no proposed measure could be circulated or placed on the ballot if the state determined the measure had more than one subject or if the state would not set a title for the proposed measure.

Since this new "single subject" requirement first became effective in 1995, hundreds of citizen-proposed ballot measures have been determined by the Colorado title board[1] or by the Colorado Supreme Court to contain more than one subject, such that no title was set, and the proponents of banned measures were not permitted to circulate their petitions to qualify their measures for the ballot.

Colorado's constitutional and statutory scheme requires that initiative proponents submit their proposed

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[1] The title setting body which consists of the secretary of state (or her designated representative), the attorney general (or his representative), and the director of the office of legislative legal services (or his designee).

measure to the title setting board. § 1-40-105, C.R.S. (1999). The title setting board is supposed to establish a clear and fair ballot title, title and submission clause, and summary for each measure. § 1-40-106, C.R.S. (1999). No title may be set for a measure comprising more than one subject. Colo. Const. Art. V, Sec. 1(5.5). The title board should apply the same single subject standards for initiatives as have been applied to legislative bills. § 1-40-106.5, C.R.S. (1999). Persons dissatisfied with the title board's actions can move for a rehearing, and if still dissatisfied, can file a direct appeal with the Colorado Supreme Court. § 1-40-107, C.R.S. (1999).

This Court has previously considered Colorado regulations on initiative petition circulation processes, in 1988, and again in 1999. In 1988, the Court found unconstitutional Colorado's criminal prohibition against the paid circulation of petitions. *Meyer v. Grant*, 486 U.S. 414 (1988). In 1999, the Court found unconstitutional three more requirements relating to petition circulation. *Buckley v. American Constitutional Law Foundation*, 119 S.Ct. 636 (1999).

In 1992, Colorado voters adopted the TABOR Amendment ("Amendment 1"), which prohibited future tax increases without voter approval. In 1994, in large measure as a response to Amendment 1, which many legislators railed against as a foolish measure which the voters must not have understood, the general assembly placed a single subject constitutional amendment on the ballot subjecting citizen initiatives to a single subject requirement, arguing that this measure, if adopted, would simply subject citizen initiatives to the same requirements that the legislature had been operating under for a century. As voters in 1994 considered and debated adopting the legislature-proposed "single subject" requirement for citizen initiatives, the general assembly

passed a bill, now codified at § 1-40-106.5, C.R.S. (1999), which stated legislative intent that citizen initiatives be subject to the same single subject requirements as legislative bills, with the same standards, and they instructed the title board to apply the same standards in setting titles for citizen measures, that the Colorado Supreme Court had historically applied to legislative bills.

The title board did initially attempt to apply the same standards to initiatives as had been applied historically to legislative bills. The Colorado Supreme Court, however, created (and continues to develop) new standards for citizen initiatives. Where (as Ms. Lennahan testified at trial) only one legislative bill had been invalidated on single subject grounds in Colorado history (but after passage into law, including the governor's signature, not before legislative consideration), dozens of citizen initiatives were invalidated in the first couple of years. The number has since grown to hundreds.

One member of the title board (Rebecca Lennahan, an official capacity Respondent in this action) has advised the Colorado general assembly on single subject matters since 1972, when she first wrote a memo to the legislature explaining the single subject requirement for legislative bills. Despite her presence on the title board, along with the attorney general and the secretary of state, dozens and dozens of measures which the title board determined contained only one subject, and for which it then set titles, were later invalidated by the Colorado Supreme court for single subject violations.

Even Colorado's foremost expert (Ms. Lennahan) on single subject requirements has been unable to anticipate what the Colorado Supreme Court would find offensive. What is

typically found offensively complex in citizen proposals are measures which would significantly limit government, especially proposals to cut taxes, limit spending, and reform the judiciary. Even where the Colorado Supreme Court has once identified offending second subjects in a measure, and proponents have subsequently eliminated the offending item, then persuaded the title board to set a new title, the Court has then been able to discover additional offensive "second subjects." In some cases, this iterative process has gone on for years, with proponents perpetually stymied by the Court never allowing their proposals to be circulated. The title setting process has become the biggest obstacle to Colorado citizens proposing substantive political change to the voters of Colorado.

STATEMENT OF THE CASE

Petitioners are public interest organizations and activists in initiative activities. They challenge Colorado's title setting process as a prior restraint and as content control on petitioning the government for redress of grievances and on political speech. They challenge the title setting process as giving the title board and the Colorado Supreme Court arbitrary and standardless authority to prevent or interfere with citizen petitioning activity.

Petitioners brought their action in the district court pursuant to 28 U.S.C. §§ 1331, 1343(3), and 1343(4), alleging violations of their rights as protected by the First and Fourteenth Amendments.

The district court concluded in its August 4, 1998, decision, that Colorado's title setting regulatory scheme was a reasonable regulation of election processes and that these regulations were not subject to strict scrutiny because they did

not impact the petition circulation process. (App. C at 34a). The district court also found any burdens on Petitioners' First Amendment rights were *de minimis*. (App. C at 39a).

Although not finding any First Amendment burden, the district court did find that Colorado Supreme Court decisions applying the single subject restriction "provide a substantial basis for Plaintiffs' trepidation" . . . that initiatives are targeted "based on the unpopularity of their proponents and their message." (App. C at 43a).

The district court "dismissed out of hand" Petitioners' argument that citizen initiatives involve a form of activity protected by the Petition Clause of the First Amendment. (App. C at 39a).

The district court dismissed the three organizational plaintiffs for lack of standing, even though the district court had accepted at trial Colorado's stipulation to their standing.

The district court found that Colorado's scheme controlling citizen initiatives through title restrictions presented no equal protection problem, even though the evidence showed that Colorado applies dual standards to single subject analysis -- deferential and only after a bill becomes law, for the legislature; and patronizing and condescending before a petition can even be presented to voters for discussion and signatures, for citizen measures -- even though Colorado statutes provide for identical standards for both. (App. C at 46a).

On appeal, the Tenth Circuit affirmed the district court decision. The Tenth Circuit regarded Petitioners' appeal of the dismissal of the organizational plaintiffs as irrelevant, because other plaintiffs still remained in the case. (App. A at

2a). The Tenth Circuit found that regulations resulting in requiring initiative proponents to propose their comprehensive measure through multiple, separate petitions, might enhance speech by forcing more political speech than would occur on one consolidated proposal. (App. A at 16a).

Both the district court and the Tenth Circuit applied "flexible scrutiny" to analyze the challenged regulations, and balanced the First Amendment burdens caused by the regulations against the asserted regulatory interests of Colorado. (App. A & C). Both found Colorado's asserted interests superior to Petitioners' First Amendment concerns.

REASONS FOR ALLOWING THE WRIT

Citizen law-making (at the state and local level) through initiatives is playing an increasingly prominent and controversial role in American politics. As this form of law-making becomes more prominent, it provokes increasing antagonism from those who dislike or distrust it and its results.[2] Often this antagonism is expressed through new laws to regulate and limit citizen power to legislate directly, and through direct acts of political interference. It is important for this Court to address the extent to which First Amendment protections apply to fundamental aspects of the initiative process.

In past cases dealing with initiatives, this Court has addressed the validity of petition circulation regulations, but only looked at the free speech rights of petition circulators

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[2] David Broder has authored a recent book presenting many of today's popular criticisms of the growing importance of citizen initiatives. *See Democracy Derailed*, Harcourt, 2000.

and petition proponents as they relate to the petition circulation process. As more and more states are placing restraints and hurdles in the path of citizen law-makers, now regulating initiative content, setting ballot titles, etc., it is vitally important to establish where else First Amendment protections apply.

Citizen initiatives involve an exercise of sovereign self-government by the people, something much grander in scope than simply a petition for ballot qualification, which is all the Court has looked at. Petitioners don't ask this Court to instruct Colorado on the wisdom or efficay of its political processes. What they do ask is that appropriate First Amendment standards be articulated to protect citizen law-making.

It is inconceivable in this nation, where the people are sovereign, that a state government can dictate the content of citizen proposals for political change, or that a state government could decide its citizens are too ignorant to be allowed to consider certain proposals for political change. Limitations on voting rights based on property ownership, gender, race, or poll taxes, have long been abolished -- without destroying the Republic (despite the fears of many of the Founders). Limitations on law-making rights based on the government's views of citizen intelligence or competence, are incompatible with the views on government expressed in the Declaration of Independence and with the First Amendment and with the concept of a government based on the will of the people, which is, after all, the very definition of a *republic*.

There shall be no laws passed abridging the freedom of any person to petition for changes in the form of government.

I. Colorado cannot, consistently with First Amendment-protections for the right to petition and for free speech, regulate the content of citizen proposals for political change when those proposals are put forward as citizen initiatives.

Colorado's newly enacted (in 1994, first effective in 1995, after 81 years without such a requirement) single subject requirement for citizen initiatives is a content-based prior restraint on petitioning and speech being used to prevent dozens (now hundreds) of proposed initiatives from even being presented to voters for their signatures or from being presented to voters for adoption. The district court found that Appellants had shown a substantial basis for their trepidation that the Colorado Supreme Court targets initiatives based on the unpopularity of their proponents and their message, but neither the district court nor the Tenth Circuit found this offensive to First Amendment-protected rights and liberties. It is.

Citizen proposals for political change are being subjected to impossible-to-define restrictions such that any proposal for serious and substantive political change is likely to be seen as embracing more than one subject, or *even more than one object*. For example, the frequently unavoidable impact of a new law on previously existing laws is now seen as a disqualifying second subject. The Colorado Supreme Court has created an impossible standard for compliance without any logic or authority and without any source for its newly-evolving standards. The historical Colorado single subject standards which it was promised would be applied to citizen initiatives are being ignored by the Colorado Supreme Court and now by the title board which scrambles to keep up with ever-evolving standards.

The courts below rejected out of hand the idea that the single subject requirement for initiatives should bear some resemblance to the single subject requirement for legislative bills (the equal protection argument). What they overlooked is that there are no other standards for the title board or Colorado Supreme Court to apply, other than those developed from the century- old single subject rule for legislative bills. Colorado voters were promised the single subject rule for initiatives would be the same as for legislative bills by the legislature in the form of a bill that was passed into law a few months before the citizens voted to adopt single subject requirements for initiatives.

The courts below overlooked the extensive and compelling trial court record in this matter. Plaintiffs below provided extensive evidence that their proposed initiatives have been repeatedly rejected based on arbitrary and unfathomable Colorado Supreme Court decisions. Plaintiffs showed that the title board cannot understand or anticipate or correctly apply the single subject requirement. Rebecca Lennahan, a member of the title board which sets initiative titles (after determining they contain only a single subject), drafted a memorandum interpreting Colorado's single subject requirement for bills in 1972, and had been working with that rule for 26 years at the time of trial. Ms. Lennahan testified that there is now a double standard in Colorado, with citizen initiatives subject to a different single subject standard than legislative bills.

If Ms. Lennahan, Colorado's foremost expert on the single subject rule, and the secretary of state and the Attorney General collectively fail, time after time after time, to "correctly" apply the single subject rule -- according to the Colorado Supreme Court -- then ***the rule must be fatally vague and undefined***, investing the Court with arbitrary and

unreviewable discretion. This type of discretionary power over First Amendment activity is intolerable. The courts below overlooked this problem.

Every time the Colorado Supreme Court has rejected a proposed initiative and title on single subject grounds -- and this has happened dozens of times in the past five years -- the title Board has previously set the title, believing the measure was in compliance with the single subject rule. The Colorado Supreme Court has standardless and unpredictable arbitrary power to prohibit citizen initiatives from even being proposed to Colorado citizens.

The courts below misread Supreme Court precedent and misinterpreted a screening test as a standard of review. This Court has often in election law cases utilized a *balancing test* to contrast the state's asserted interest in a regulation with the First Amendment burden the regulation imposed on voting and association rights of plaintiffs. When the Court has determined that First Amendment (voting and association) burdens are slight, and the regulation serves a legitimate purpose, regulations are evaluated on a *rational basis* standard of review. When the Court has determined that the burdens on First Amendment (voting and association) rights are severe, *strict scrutiny* is applied. *See Buckley v. American Constitutional Law Foundation*, 119 S.Ct. 636, 641-642 (1999)

The Tenth Circuit misinterpreted the Supreme Court's election law *balancing test* as a standard of review. (Pet. App.). That Court then compounded this error by looking at Colorado's control of initiative content, as a regulation on the *voting process*, not as what it is, an arbitrary and standardless regulation on the content of political speech and

a severe burden on the right to petition for redress of grievances.

The Right To Petition For Redress Of Grievances

The right to petition and the right of free speech (cognate rights) were not gifts from government. In Seventeenth Century England, these rights were established after civil war and revolution. In Eighteenth Century America, the Founders established these rights on American soil, after a successful revolution against the most powerful nation on earth.

Presenting a petition for redress is an exercise of sovereignty and is precisely what the Petition Clause of the First Amendment must protect against arbitrary restraint and interference. Petitioners do not argue the Petition Clause requires states establish an initiative process, but that the Petition Clause *protects the process* once it has been established.

The Petition Clause was derived from the English right of petitioning, a right which originated with Parliament's petitions to the King, then included petitions from the people to the Parliament and to the King. *See* Blackstone's *Commentaries*, bk. 1, ch.1, sec. 3. The essence of our right is not petitioning to "one's representatives," but *petitioning to the government*, as the plain language of the First Amendment makes clear.[3]

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[3] The Framers of the First Amendment at first considered a proposal to petition one's representatives. That was amended to read: "petition the government." The "government" is a broader concept than "one's representatives." *See* Cogan, *The Complete*

The King or Parliament claimed to represent all Englishmen. Those who demanded the right to petition thought otherwise. The right to dissent and the right to individual liberty depend on the Petition Clause. As John Lilburne and his Seventeenth Century Leveller friends discovered, popular petitions were often met with charges of treason. See *The Levellers*, Joseph Frank, 1955 (Lilburne was tried for treason in 1649 after submitting petitions for political reform in England. Leveller proposals branded treasonous included term limits for Parliament and for judges; universal man suffrage; guaranteed freedom from state-imposed religious practices and tithes; the right against self-incrimination; the end to cruel and unusual punishment; the end of military conscription; the guarantee of jury trials in all criminal cases; the translation of English laws from Law French into English, so that the people could understand them; the right to counsel in criminal trials; the end of free quartering of soldiers; and the end of economic monopolies. Lilburne's defense at his treason trial rested in part on his argument that his proposals for reform were simply an exercise of the right to petition. A jury vindicated Lilburne.

During colonial times in America, colonists utilized the right to petition to directly involve themselves in colonial legislative processes:

> In colonial America, the right of citizens to petition their assemblies was an affirmative, remedial right which required governmental hearing and response. Because each petition commanded legislative

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Bill of Rights (1997).

> consideration, citizens, in large part, controlled legislative agendas.

Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142.

Colonial petitions to Parliament and the King were often met with scorn:

> In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.

The Declaration of Independence (1776).

Since the time of the Revolution, the right to petition has continued to erode at the federal and state level as it has been treated as not implying the corollary obligation of legislative bodies to respond. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 158. One can reasonably infer that the loss of the original significance of the "right to petition," the elimination of the obligation of legislative bodies to respond to petitions, contributed greatly to the frustration leading to turn-of-the-century adoption of direct citizen initiative and referendum processes.

Colorado is tramelling the constitutionally-reserved right to initiative and referendum, through title board and court control of petition contents. If the First Amendment right to "peaceably petition the government for redress of grievances" is denied, history shows that a free and sovereign people may well pursue less pleasant alternatives.

"Appellees seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment." *Meyer v. Grant*, 486 U.S. 414, 421 (1988). The initiative petition itself embodies the citizens' proposal for political change. What the courts below overlooked is that the petition proposal embodies core political speech, where "the importance of First Amendment protections is at its zenith." *Id.*, at 425.

Colorado can't dictate or control petition content in order to protect the public: "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). Colorado's asserted regulatory interest -- protecting voters from confusion, is a subterfuge being used to mask arbitrary prior restraints and content control on a fundamental exercise of First Amendment-protected liberties. In *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995), this Court held:

> The "ordinary litigation" test does not apply here. . . It is a regulation of pure speech. Moreover, even though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech. Every written document covered by the statute must contain "the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor." Furthermore, the category of covered documents is defined by their content -- only those publications containing speech designed

> to influence the voters in an election need bear the required markings. . . . Consequently, we are not faced with an ordinary election restriction; this case "involves a limitation on political expression subject to exacting scrutiny."

McIntyre v. Ohio Election Commission, 514 U.S. 334, 345-346 (1995).

Similarly in this case, Colorado only applies its "strict review" of content on single subject grounds to proposed citizen initiatives. Legislative ballot proposals (legislative referenda) are not subject to any analysis before an election, and legislative bills are subject to great deference when, if ever, they are reviewed by a Court. One bill was found to violate the single subject requirement in the past century. Legislature-proposed ballot measures and bills are not protected by the First Amendment -- but citizen petitions must be. Colorado's disparate treatment shows the lack of any compelling state interest and that the regulations are not narrowly tailored.

Prior restraint is anathema to the First Amendment, as are content-based or source-based restrictions. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Colorado's title board and Supreme Court must be similarly "disqualified."

As shown by substantial evidence at trial, the governmental title setting process and single subject requirement are being used by opponents and by the

government itself to prevent Petitioners from presenting their petitions to Colorado voters. Colorado citizens aggrieved by their government's actions are being stymied by that same government in their attempts to promote peaceful political change.

Standard of Review Confusion

The courts below inappropriately related this case to cases evaluating petition circulation regulations, and analyzed the questions presented by standards developed for analyzing ballot access regulations. What the courts below missed is that the creation of a ballot proposal involves the exercise of fundamental First Amendment activity -- petitioning and speech -- and that the nature of that exercise makes all state interference, restraint, and entanglement problematical and suspect. Strict scrutiny must be applied.

Circuit Confusion on Single Subject Regulations

The Tenth Circuit decision notes *dicta* from *Buckley v. American Constitutional Law Foundation*, 119 S.Ct. 636 (1999), that appears to countenance a single subject requirement. (App. A at 18a). The single subject requirement was not briefed, nor argued, nor decided in *Buckley*.

The Tenth Circuit opinion below also cites favorably to an Eleventh Circuit decision upholding Florida's single subject requirement for citizen initiatives, *Biddulph v. Mortham*, 89 F.3d 1491 (11th Cir. 1996). (App. A at 18a). In *Biddulph*, the court was dealing with Florida's law governing its initiative procedures, laws differing greatly from Colorado's. Florida law gives the petition sponsor the authority to determine his own text, title, and summary.

Biddulph, 89 F.3d at 1494. *The plaintiff there did not contend that Florida's procedures had a disparate impact on any particular viewpoint or that they allowed content based discrimination, or that they were applied in a discriminatory fashion, or that they burdened his exchange of ideas in furtherance of his proposal.* *Id.*, at 1500. Mr. Biddulph's challenge was not really a First Amendment challenge.

Buckley employed a balancing test to determine whether a regulation should be subject to rational basis or strict scrutiny review. *Buckley v. ACLF*, 119 S.Ct. at 641-642. The balancing test is not a standard of review in itself. The Court (when dealing with voting and associational rights) balances the state's interest against the degree of First Amendment harm inflicted. *Id.* Regulations inflicting "serious" harms are subject to strict scrutiny.[4] *Id.*

The courts below accepted Colorado's argument, rather than Petitoners' evidence, that any injuries to Petitioners are *de minimis*. A state's estimation of the harm it causes to citizens should never be given any serious weight, as *Buckley* teaches. *See Id.*, at 644 (Colorado's assertion that registering to vote is easy and not a severe burden does not save the registration requirement).

The loss of First Amendment freedoms . . . constitutes irreparable injury. Elrod v. Burns, 427 U.S. 347, 373 (1976). Contrary to the Tenth Circuit's opinion (Pet. App.), requiring Petitioners to present multiple initiatives (getting roughly 100,000 signatures for each), is not an enhancement of free speech. "That [Colorado] leaves open

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[4] As were all three regulations struck down in *Buckley subjected to strict scrutiny.*

'more burdensome' avenues of communication, does not relieve its burden on First Amendment expression." *Meyer v. Grant*, 486 U.S. at 424.

Arbitrary, discretionary power to restrain the exercise of First Amendment freedoms is impermissible. *See Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (re: parade permits); *Nationalist Socialist Party v. Skokie*, 432 U.S. 43 (1977) (requiring safeguards for state rule barring Nazis from displaying swastika). Arbitrary and discretionary power to limit parades and demonstrations is invalid. *Cox v. Louisiana*, 379 U.S. 536, 557 (1965). Arbitrary discretion to limit presentation of initiatives creates a threat of censorship which by its existence chills First Amendment activity. *See Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964 (1984).

Petitioners' activities in promoting political change have been severely burdened by Colorado's ballot title setting controls. Who knows how many petitions have not been presented because of the chilling effects of Colorado's regulatory interference with the initiative process?

II. The District Court Erred When Dismissing The Organizational Plaintiffs For Lack Of Standing, Since The Court Had Accepted Colorado's Stipulation Of Standing.

Petitioners were prepared to submit evidence at trial that the organizational plaintiffs (Initiative and Referendum Institute, Americans for Sound Public Policy, and the American Constitutional Law Foundation, Inc.) each had standing, but Colorado stipulated to their standing. The trial court accepted that stipulation at the same time and in the same manner that it accepted the stipulation of admissibility

of certain trial exhibits. Had that stipulation not been accepted, the Petitioners would have put on more evidence.

Even without more evidence, the record establishes that these organizational Petitioners do have standing. The opening sentence of the district court's opinion appears to recognize that fact. (App. C at 26a). The allegations in the First Amended Complaint assert these organizations have membership in Colorado; activity in initiatives, both past and contemplated; injury from the title setting process, past or threatened; and the need for declaratory and injunctive relief.

American Constitutional Law Foundation, Inc. ("ACLF"), did not put on evidence as to its standing, because standing was stipulated and the stipulation was accepted. ACLF had previously established its standing in related litigation concerning other initiative regulations. As Petitioners reminded the Tenth Circuit on appeal, ACLF was the lead plaintiff in an initiative regulation case then pending in this Court, a case which had earlier originated in the District of Colorado and in the Tenth Circuit, *Buckley v. American Constitutional Law Foundation*, 119 S.Ct. 636 (1999).

The Tenth Circuit declined to address the standing issue, since some plaintiffs still had standing and all had utilized the same counsel. Standing as a party confers rights not available to a non-party, such as the right to appeal. A party dismissed from a case is less likely to want to fund further appeals by remaining parties, and may find it more difficult to raise funds from members to support an appeal. Parties may differ on appeal strategies and desire different counsel. There was no demonstration that remaining plaintiffs could adequately represent the interests of the organizational plaintiffs. What the Tenth Circuit did not

consider was the financial harm possibly resulting to Petitioners on appeal as a result of dismissing the organizational plaintiffs, and the harm that might result from the remaining plaintiffs deciding not to pursue an appeal.

When the district court accepted a stipulation to standing which could have been supported by evidence, it is a denial of due process for the court to withdraw its acceptance of that stipulation after the trial.[5]

CONCLUSION

First Amendment freedoms are too precious to sacrifice to hypothetical state concerns about voter incompetence or ignorance or potential confusion.

Neither the First, Fifth, or Sixth Amendments would pass Colorado's single subject requirements. Each of these amendments would be considered multifarious, too complex for voters to consider. After all, what do freedom of religion, freedom of the press, freedom of speech and the right to petition and the right to assemble have in common? Following Colorado's logic, voters would be required to consider and debate each right separately -- if proponents could qualify five separate petitions -- then decide separately which of these rights they value. Voters would otherwise be too easily confused, or misled, if asked to vote on these First Amendment rights as a package.

The writ should be allowed.

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[5] Although the withdrawal of acceptance may have been inadvertent, as the district court may have forgotten about the trial stipulation.

/s/_____

Paul Grant
6426 S. Quebec Street
Englewood CO 80111
(303) 771-1908

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed: February 10, 2000]

No. 98-1329

DOUGLAS CAMPBELL, RICHARD HAMILTON, CLYDE HARKINS, JACK HAWKINS, DANIEL HAYES, GARY SWING, JEFFREY WRIGHT, DOUGLAS BRUCE, THE INITIATIVE AND REFERENDUM INSTITUTE, AMERICANS FOR SOUND PUBLIC POLICY, and the AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.,
Plaintiffs - Appellants,

v.

VICTORIA BUCKLEY, in her official capacity as Secretary of State for the State of Colorado and member of the Colorado State Initiative and Referendum Title Board, COLORADO STATE INITIATIVE AND REFERENDUM TITLE BOARD, and RICHARD WESTFALL and REBECCA LENNAHAN in their official capacities

as Title Board members,)
Defendants - Appellees.)
)

JUDGES: Before BRISCOE, REAVLEY*, and MURPHY, Circuit Judges.

OPINION

REAVLEY, Senior Circuit Judge.

Eight individuals and three organizations[1] brought this action challenging the constitutionality of the "title setting" requirements of the State of Colorado's ballot initiative law.

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* Honorable Thomas M. Reavley, United States Senior Circuit Judge for the Fifth Circuit, sitting by designation.

[1] The three institutional plaintiffs challenge the district court's holding that they lacked standing. Because the individual plaintiffs are proponents of past and present initiatives and have standing, and because all plaintiffs are represented by the same counsel and jointly raise the same substantive arguments on appeal, we decline to address the standing issue. In these circumstances there is no need to address the standing of the institutional plaintiffs, *see Bowsher v. Synar*, 478 U.S. 714, 721, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986); *Secretary of the Interior v. California*, 464 U.S. 312, 319 n.3, 78 L. Ed. 2d 496, 104 S. Ct. 656 (1984), particularly where, as here, these plaintiffs have not obtained relief different from that of the plaintiffs who do have standing, *see General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 402 n.22, 73 L. Ed. 2d 835, 102 S. Ct. 3141. (1982).

The district court, after a bench trial, upheld the constitutionality of the Colorado scheme.[2] We affirm.

BACKGROUND

The Colorado Constitution reserves to the people the power to enact laws and constitutional amendments by initiative, and to reject by referendum laws passed by the general assembly.[3] An initiative is placed on the ballot after the proponent secures by petition the required number of signatures by registered electors.[4] A referendum similarly may be placed on the ballot by circulating a petition, or may be placed on the ballot by the general assembly.[5] Initiatives and referenda placed on the ballot and approved by majority vote are not subject to the governor's veto power.[6]

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[2] *Campbell v. Buckley*, 11 F. Supp. 2d 1260 (D. Colo. 1998).

[3] *See* Colo. Const. art. V, § 1(1).

[4] For the initiative to be placed on the ballot, the petition must be signed by registered electors equal in number to at least five percent of the total number of votes cast for the office of secretary of state in the previous election. *See id.* art. V., § 1(2). A "registered elector" is a person legally qualified to vote who has complied with state registration provisions. *See* Colo. Rev. Stat. § 1-1-104(12) & (35) (1999).

[5] *See* Colo. Const. art. V, § 1(3).

[6] *See id.* art V, § 1(4).

Colorado has various procedures, set out in its constitution and statutes, which regulate initiatives. "The Colorado Constitution grants the general assembly the authority to adopt legislation designed to prevent fraud, mistake, or other abuses in the petition process."[7]

Appellants challenge the "title setting" requirements of the ballot initiative procedure. Under these requirements, initiatives must comply with a " single subject" rule, and are given a title and summary by state officials before the petition is circulated. Under Art. V., § 1(5.5) of the Colorado Constitution:

> No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

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[7] *American Constitutional Law Found., Inc. v. Meyer,* 120 F.3d 1092, 1096 (10th Cir. 1997) (internal quotation marks omitted), *aff'd sub nom. Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999). We refer to both decisions as "*ACLF.*"

This provision was added to the Colorado Constitution by constitutional amendment approved by the voters in 1994.

Similar single subject requirements apply to bills and constitutional amendments proposed by the general assembly, other than general appropriations bills.[8]

By statute, the proponent of a ballot initiative must submit a draft of the initiative petition to the directors of the state legislative council and the office of legislative legal services for review and comment.[9] The proponent may amend the petition in response to these comments.[10] "To the extent possible, drafts shall be worded with simplicity and clarity and so that the effect of the measure will not be misleading or likely to cause confusion among voters."[11] The draft is then submitted to the secretary of state.[12] The "title board," consisting of the secretary of state, attorney general,

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[8] *See* Colo. Const. art. V, § 21 ("No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title . . . ."); *id.* art. XIX, § 2(3) ("No measure proposing an amendment or amendments to this constitution shall be submitted by the general assembly to the registered electors of the state containing more than one subject, which shall be clearly expressed in its title . . . .").

[9] *See* Colo. Rev. Stat. § 1-40-105(1) (1999).

[10] *See id.* § 1-40-105(2).

[11] *Id.* § 1-40-105(3).

[12] *See id.* § 1-40-105(4).

and director of the office of legislative legal services or the director's designee, then gives the initiative a "proper fair title," a submission clause, and an impartial summary.[13] The petition cannot be circulated for the required signatures unless these procedures are followed.[14] If the proponent is dissatisfied with the title, submission clause, or summary, he may move for rehearing with the title board, and if rehearing is overruled, he may seek review in the Colorado Supreme Court.[15]

The reasons for the title setting requirements are described by statute:

> (d) The Colorado supreme court has held that the constitutional single-subject requirement for bills was designed to prevent or inhibit various inappropriate or misleading practices that might otherwise occur, and the intent of the general assembly in referring to the people section 1(5.5) of article V and section 2(3) of article XIX was to protect initiated measures and referred constitutional amendments from similar practices;
> (e) The practices intended by the general assembly to be inhibited by section 1(5.5) of

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[13] *See id.* § 1-40-106(1) & (3). The submission clause is "the language which is attached to the title to form a question which can be answered by 'yes' or 'no.'" *Id.* § 1-40-102(8).

[14] *See id.* § 1-40-107(4).

[15] *See id.* § 1-40-107(1) & (2).

> article V and section 2(3) of article XIX are as follows: (I) To forbid the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits; (II) To prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon voters.[16]

Appellants alleged in their complaint that the statutory scheme, on its face, violates their federal constitutional rights under the First and Fourteenth Amendments "to speech, petitioning, political association, due process and voting." The complaint also alleged that as applied the single subject requirement had been used to thwart their efforts to submit legislative and constitutional changes to the voters. For example, they alleged that their proposed initiatives for tax reform and selection of judges had been kept off the ballot by opponents who, in a subjective, arbitrary, and discriminatory manner, found violations of the single subject requirement. The district court heard testimony at the trial, and also incorporated testimony previously given at a hearing on appellants' application for a preliminary injunction.

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[16] *Id.* § 1-40-106.5

After considering the arguments of the parties and the evidence, the district court held that the Colorado initiative procedures challenged by appellants did not violate federal constitutional standards.

DISCUSSION

Appellants argue that the title setting process abridges their First Amendment rights. We have recognized that "even though the initiative and referendum process is not guaranteed by the United States Constitution, Colorado's choice to reserve it does not leave the state free to condition its use by impermissible restraints on First Amendment activity."[17]

The Supreme Court and this court have written extensively on the federal constitutional requirements placed on states when they regulate the voting process. As we detail here, precedent requires that our analysis turn in large measure on whether the regulation at issue is subject to a balancing test or strict scrutiny.

A. The Balancing Test

The Supreme Court has employed a flexible approach, which we refer to as the balancing test, in a number of cases involving state regulation of the voting process. In *Anderson v. Celebrezze*,[18] the Court struck down a state filing deadline

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[17] *ACLF*, 120 F.3d at 1100.

[18] 460 U.S. 780 (1983).

for independent candidates, but in so doing recognized that constitutional challenges to a state's election laws

> cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.[19]

In *Burdick v. Takushi*,[20] a voter challenged a state ban on write-in voting, on grounds that the ban violated his right to vote under the First and Fourteenth Amendments. In

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[19] *Id.* at 789 (citation omitted).

[20] 504 U.S. 428 (1992).

upholding the ban, the Court held that strict scrutiny was not required, and that instead a balancing test was in order:

> Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. . . . Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. . . . Consequently, to subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently. . . . Instead . . . a more flexible standard applies. A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights. . . . [W]hen a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters,

> the State's important regulatory interests are generally sufficient to justify the restrictions. . . . Accordingly, we have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls.[21]

In *Timmons v. Twin Cities Area New Party*,[22] the Court upheld a state ban on multiple-party or "fusion" candidacies. Recognizing that "States may, and inevitably must, enact reasonable regulation of parties, elections, and ballots to reduce election- and campaign-related disorder,"[23] the Court again employed a flexible, balancing approach to the issue presented:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting

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[21] *Id.* at 432-434, 438 (internal quotation marks omitted).

[22] 520 U.S. 35 (1997).

[23] *Id.* at 358.

> review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.[24]

In *ACLF*, we addressed a constitutional challenge to several procedures of the then-existing law of Colorado governing ballot initiatives. While, as discussed below, we struck down several provisions under a strict scrutiny analysis, we upheld other provisions under a balancing test. We upheld a six-month window for obtaining the necessary signatures on a petition.[25] We concluded that this requirement was not subject to strict scrutiny, and upheld it as "a reasonable, nondiscriminatory ballot access regulation.[26] We similarly upheld a requirement that circulators sign an affidavit attesting that they have complied with Colorado law.[27] We also upheld a requirement that circulators be at least eighteen years of age, reasoning that the requirement imposed only a temporary disability that was not subject to exacting scrutiny.[28]

B. Strict Scrutiny

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[24] *Id.* at 358 (citations, internal quotation marks omitted).

[25] *See* Colo. Rev. Stat. § 1-40-108(1) (1999).

[26] *See ACLF*, 120 F.3d at 1099.

[27] *See id.* at 1099-1100 (discussing Colo. Rev. Stat. § 1-40-111(2) (1999)).

[28] *See id.* at 1101 (discussing Colo. Rev. Stat. § 112(1) (1999)).

In *Meyer v. Grant*,[29] the Court struck down a criminal provision of the Colorado initiative law that prohibited proponents from paying petition circulators. The Court held that the case involved "core political speech" and "a limitation on political expression subject to exacting scrutiny."[30] The Court reasoned that the law reduced "the total quantum of speech on a public issue."[31] The decision turned on the strict scrutiny the Court employed. Once it adopted this standard, it struck down the provision because "the burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable."[32]

In *ACLF*, we struck down a Colorado requirement that all circulators must be registered voters. We applied strict scrutiny to this requirement, because its effect was discriminatory, in that it excluded persons who were not registered voters from participating in core political speech, and because it limited the total quantity of speech, by limiting "the number of voices to convey the proponent's message."[33] We held, under a strict scrutiny analysis, that the state had failed to advance a compelling state interest to which the

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[29] 486 U.S. 414 (1988).

[30] *Id.* at 420, 422.

[31] *Id.* at 423.

[32] *Id.* at 425.

[33] *ACLF*, 120 F.3d at 1100.

requirement was narrowly tailored.[34] We also struck down a requirement that circulators wear identification badges giving their names. We applied strict scrutiny to this requirement, noting the district court's finding that the requirement discourages people from serving as circulators, and concluding that a requirement that stripped the circulator of his anonymity imposed a "severe" restriction on First and Fourteenth Amendment rights.[35] We also struck down requirements that the proponent file certain disclosures relating to the identities of paid circulators and amounts paid to each such circulator. Finding such restrictions analogous to the requirement of identification badges, and citing *Buckley v. Valeo*,[36] we held that these restrictions were subject to exacting scrutiny.[37] We noted that, like the requirement of identification badges, the disclosure requirements chilled constitutionally protected speech.[38]

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[34] *See id.*

[35] *See id.* at 1101-02.

[36] 424 U.S. 1, 64 (1976).

[37] *See ACLF*, 120 F.3d at 1104.

[38] *See ACLF*, 120 F.3d at 1105 (noting that provision requiring the disclosure of information specific to each paid circulator chilled speech because "[m]uch like requiring identification badges, compelling the disclosure of the identities of every paid circulator chills paid circulation, a constitutionally protected exercise," and that a second provision requiring detailed monthly disclosures "chills speech by forcing paid circulators to surrender the anonymity enjoyed by their volunteer counterparts.").

In *ACLF*, the state obtained review in the Supreme Court. The Court affirmed our judgment.[39] The Court concluded "that the Tenth Circuit correctly separated necessary or proper ballot access controls from restrictions that unjustifiably inhibit the circulation of ballot-initiative petitions."[40]

C. The Pending Challenge

"No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms."[41] In the pending case, we are persuaded that the balancing test is appropriate. As we read the decisions described above, the balancing test is a general approach our court and the Supreme Court have employed in deciding the constitutionality of content-neutral regulation of the voting process. A balancing test takes account of the Supreme Court's recognition that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[42]

Strict or exacting scrutiny has been employed in circumstances not presented in the pending case. The cases discussed above which applied strict scrutiny do not lend

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[39] *ACLF*, 119 S. Ct. at 649 (1999).

[40] *Id.*

[41] *Timmons*, 520 U.S. at 359 (1997).

[42] *Storer v. Brown*, 415 U.S. 724, 730 (1974).

themselves to a simple synthesis. As we read them, however, strict scrutiny is applied where the government restricts the overall quantum of speech available to the election or voting process. More particularly, strict scrutiny is employed where the quantum of speech is limited due to restrictions on campaign expenditures, as in *Valeo*, the available pool of circulators or other supporters of a candidate or initiative, as in *ACLF* and *Meyer*, or the anonymity of such supporters, as in *ACLF*, *Valeo*, and *McIntyre v. Ohio Elections Comm'n.*,[43] For example, the Court explained in *Meyer* "that the prohibition against the use of paid circulators has the inevitable effect of reducing the total quantum of speech on a public issue."[44] In *Valeo*, the Court applied exacting scrutiny to contribution and expenditure limits,[45] reasoning that "contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties," and that "a primary effect of . . . expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates."[46] In our view, the title setting process appellants challenge cannot be characterized as a direct limitation on the quantity of speech available to them. If anything, requiring proponents to pursue separate initiatives on separate subjects might encourage more speech on each such subject.

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[43] 514 U.S. 334, 347 (1995).

[44] *Meyer*, 486 U.S. at 423.

[45] *See Valeo*, 424 U.S. at 25, 44-45.

[46] *Id.* at 18, 39.

Having selected the balancing test, we have little trouble agreeing with the district court that the single subject and other title setting requirements are constitutional. Colorado has advanced in this litigation and by statute (quoted above) valid justifications for these requirements. The summary, single subject and title requirements serve to prevent voter confusion and promote informed decisions by narrowing the initiative to a single matter and providing information on that single matter to the voter. Further, they prevent a provision that would not otherwise pass from becoming law by "piggybacking" it on a more popular proposal or concealing it in a long and complex initiative. As with minor and third parties at issue in *Timmons*, the state has a valid interest in making sure that initiatives "granted access to the ballot are bona fide and actually supported, on their own merits, by those who have provided the statutorily required petition or ballot support."[47] These justifications are sufficient to pass constitutional muster. "The State's asserted regulatory interest need only be sufficiently weighty to justify the limitation imposed on the [plaintiff's] rights. Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justifications."[48] "The state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."[49] Colorado's title setting requirements are facially neutral and the state has offered reasonable justification for them.

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[47] *Timmons*, 520 U.S. at 366.

[48] *Id.* at 364 (citations, internal quotation marks omitted).

[49] *Anderson*, 460 U.S. at 788.

We also note that in ACLF the Supreme Court stated that "in aid of efficiency, veracity, or clarity, Colorado has provided for an array of process measures not contested here by [plaintiff]. These measures prescribe, *inter alia*, a single subject per initiative limitation . . . ."[50] While not ruling on the constitutionality of the single subject provision, the Court did note its apparent virtue, and explained that "our judgment is informed by other means Colorado employs to accomplish its regulatory purposes."[51] The Court also cited, with apparent approval, *Biddulph v. Mortham*,[52] as a case "upholding single subject and unambiguous title requirements for initiative proposals to amend Florida's Constitution."[53]

While appellants offered evidence below of difficulties they have encountered in complying with the single subject requirement,[54] they did not prove that the state applied the

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[50] *ACLF*, 119 S. Ct. at 649.

[51] *Id.* at 642.

[52] 89 F.3d 1491 (11th Cir. 1996).

[53] *ACLF*, 119 S. Ct. at 642.

[54] We note that the district court was not particularly sympathetic to these difficulties. For example, the court agreed with the state "that the frustration Plaintiffs Bruce and Wright have experienced at their inability to see Initiative # 30 through the title-setting process is less a function of a system gone awry than of their refusal, which Plaintiff Bruce candidly acknowledged at trial, to change the proposal's language in any significant way during the course of 12 submissions." *Campbell*, 11 F. Supp. 2d at 1267.

single subject requirement in a manner that discriminated against proponents on the basis of the content of their initiatives.[55] While compliance with the single subject requirement may be difficult for some who wish to offer ballot initiatives, and may to some extent limit their goal of unfettered participation in the electoral and legislative process, we are satisfied that the state's reasons for its procedures are sufficiently weighty to justify the procedures.

D. Equal Protection

Appellants separately argue that the title setting requirements amount to an equal protection violation. They contend that even though both the general assembly and proponents of citizen initiatives are subject to title setting requirements, the general assembly, through its own conduct and as sanctioned by the Colorado Supreme Court, has much more leeway than citizens on these requirements. For example, they contend that legislatively referred measures cannot be challenged for single subject compliance until after

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[55] Appellants point to language in the district court's opinion that certain Colorado Supreme Court cases "provide a substantial basis for Plaintiffs' trepidation" that these cases "target initiatives based on the unpopularity of their proponents and their message." *Id.* at 1267-68. However, the district court ultimately found that a "discernible pattern or practice of illicit discrimination" had not been shown, and that "the single-subject scheme is content-neutral and Plaintiffs' claims that it is being discriminatorily applied to them are unsupported by the evidence." *Id.* at 1267, 1269. On this record we cannot say that the district court's finding is erroneous.

voter approval,[56] and that legislative bills similarly cannot be challenged until after they are passed into law. In contrast, citizen initiatives are subjected to single subject approval before the petition can be circulated. They further argue that, by statute, the title setting process for citizen initiatives is supposed to be conducted in the same manner as the title setting process for general assembly bills.[57]

In our view, the alleged differences in the treatment of citizen initiatives and acts of the general assembly simply do not lend themselves to an equal protection analysis. "The Equal Protection Clause . . . is essentially a direction that all

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[56] *See Polhill v. Buckley*, 923 P.2d 119, 120 (Colo. 1996) (holding that Colorado Supreme Court lacks jurisdiction to review legislative referendum for compliance with single-subject requirement until approved by voters.)

[57] As discussed above, the single subject requirement for citizen initiatives is found at Colo. Const. Art. V, § 1(5.5). General assembly bills as well as constitutional amendments proposed by the general assembly and submitted to the electorate are also subject to a single subject requirement. *See* Colo. Const. art. V, § 21 & art. XIX, § 2(3). The general assembly has expressed its intent that "section 1(5.5) of article V and section 2(3) of article XIX be liberally construed, so as to avert the practices against which they are aimed and, at the same time, to preserve and protect the right of initiative and referendum." Colo. Stat. Ann. § 1-40-106.5(2) (1999). It has also expressed its intent "that, in setting titles pursuant to section 1(5.5) of article V, the initiative title setting review board created in section 1-40-106 should apply judicial decisions construing the constitutional single-subject requirement for bills and should follow the same rules employed by the general assembly in considering titles for bills." *Id* § 1-40-106.5(3).

persons similarly situated should be treated alike."[58] "The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike. But so too, the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States."[59] "In order to assert a viable equal protection claim, plaintiffs must first make a threshold showing that they were treated differently from others who were similarly situated to them."[60] Ordinarily the Equal Protection Clause is applied to claims of class-based discrimination.[61]

Citizens who propose legislation through the initiative process and members of the general assembly who pass bills are not similarly situated classes. Members of the general

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[58] *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985).

[59] *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation, brackets, internal quotation marks omitted).

[60] *Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998).

[61] *See, e.g., Plyler*, 457 U.S. at 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."); *United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979) ("The Equal Protection Clause prohibits selective enforcement based upon an unjustifiable standard such as race, religion, or other arbitrary classification.") (internal quotation marks omitted).

assembly must win an election to even serve in that body, and, unlike initiatives, general assembly bills are subject to veto by the governor. Before a vote on a bill, it is subject to committee consideration, amendment, and debate according to the rules of the general assembly. The legislative process and the initiative process are so fundamentally different that we cannot read the Equal Protection Clause of the federal Constitution to require the state to afford the same title setting treatment to these two processes.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 98-K-1022

[Filed: August 4, 1998]

DOUGLAS CAMPBELL, RICHARD HAMILTON, CLYDE HARKINS, JACK HAWKINS, DANIEL HAYES, GARY SWING, JEFFREY WRIGHT, DOUGLAS BRUCE, THE INITIATIVE AND REFERENDUM INSTITUTE, AMERICANS FOR SOUND PUBLIC POLICY, and the AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC..	)
Plaintiffs - Appellants,	)
v.	)
VICTORIA BUCKLEY, in her official capacity as Secretary of State for the State of Colorado and member of the Colorado State Initiative and Referendum Title Board, COLORADO STATE INITIATIVE AND REFERENDUM TITLE BOARD, and RICHARD WESTFALL and REBECCA	)

LENNAHAN in their official capacities)
as Title Board members,)
Defendants - Appellees.)
)

JUDGMENT

Pursuant to and in accordance with the Findings of Fact and Conclusions of Law entered by Judge John L. Kane, August 4, 1998, which is incorporated herein by reference as if fully set forth. It is ordered

1. That judgment is entered in favor of the defendants Victoria Buckley, Colorado State Initiative and Referendum Title Board, Richard Westfall and Rebecca Lennahan and against the plaintiffs Douglas Campbell, Richard Hamilton, Clyde Harkins, Jack Hawkins, Daniel Hayes, Gary Swing, Jeffrey Wright, Douglas Bruce, The Initiative and Referendum Institute, Americans for Sound Public Policy and the American Constitutional Law Foundation, Inc,

2. The complaint and cause of action is dismissed.

3. Defendants may file a bill of costs within ten days. DATED at Denver, Colorado, this 4th day of August, 1998.

FOR THE COURT:
JAMES R. MANSPEAKER, CLERK
By: _____
Stephen P. Ehrlich
Chief Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 98-K-1022

[Filed: August 4, 1998]

DOUGLAS CAMPBELL, RICHARD HAMILTON, CLYDE HARKINS, JACK HAWKINS, DANIEL HAYES, GARY SWING, JEFFREY WRIGHT, DOUGLAS BRUCE, THE INITIATIVE AND REFERENDUM INSTITUTE, AMERICANS FOR SOUND PUBLIC POLICY, and the AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.,	)
Plaintiffs - Appellants,	)
v.	)
VICTORIA BUCKLEY, in her official capacity as Secretary of State for the State of Colorado and member of the Colorado State Initiative and Referendum Title Board, COLORADO STATE INITIATIVE AND REFERENDUM TITLE BOARD, and RICHARD WESTFALL and REBECCA	)

LENNAHAN in their official capacities)
as Title Board members,)
Defendants - Appellees.)
)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs are individual activists and proponents of past and present Colorado ballot initiatives and nonprofit public interest groups dedicated to the promotion and protection of citizen initiative processes. Together they filed this 42 U.S.C. § 1983 action challenging the constitutionality of Colorado's petition laws, and seeking declaratory and injunctive relief. Specifically, Plaintiffs challenge § 1(5.5) of article V of the Colorado Constitution, which proscribes the circulation of any proposed ballot initiative for which no single-subject can be clearly expressed in its title, and the statutory title-setting process implementing it. Plaintiffs argue the proscription allows not only the State to dictate the content of proposed ballot initiatives, but political opponents to thwart their circulation entirely through the initiation of repeated single-subject challenges, both of which violate their "associational [rights], right to petition for redress of grievance[s], due process rights, free speech rights and voting rights under the First and Fourteenth Amendments." (Pls.' Compl. at ¶ 37.)

Plaintiffs also argue that the title-setting process violates the Equal Protection Clause of the Fourteenth Amendment because it subjects only citizen-based initiatives to single-subject challenges before inclusion on the ballot, while legislatively referred measures proceed directly to the ballot without such scrutiny.

In May 1998, I consolidated Plaintiffs' request for preliminary injunctive relief with their request for permanent injunctive and declaratory relief and set a June 22 trial date. The two-day trial to the court concluded on June 23, 1998. Under the "flexible" standard of scrutiny applicable to petition law challenges pursuant to *American Constitutional Law Found. v. Meyer*, 120 F.3d 1092, 1098 (10th Cir. 1997), I deny both claims for relief. The evidence and arguments presented failed to demonstrate that the burdens imposed by the single-subject scheme are of a character or magnitude sufficient to trigger exacting review. I find Colorado's regulatory interests in preventing voter fraud and ensuring a modicum of support for measures placed on its ballot justify the reasonable and nondiscriminatory burdens the scheme imposes on Plaintiffs' rights of political expression and association and reject Plaintiffs' first amendment claim. I also find that a rational basis exists for the disparate treatment of measures initiated by citizens and those referred by the General Assembly, and reject Plaintiffs' equal protection claim as well.

The following constitute my findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a):

I. STANDARD FOR INJUNCTIVE RELIEF.

The standard for determining whether a permanent injunction should issue is the same as that for preliminary relief, except that the court determines plaintiff's actual success on the merits rather than his likelihood of success. *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n. 12, 94 L. Ed. 2d 542, 107 S. Ct. 1396 (1987) (citation omitted). In this circuit, Plaintiffs must

establish not only that Colorado's ballot initiative procedures are unconstitutional as alleged, but also that (1) they will suffer irreparable injury unless the injunction issues; (2) the threatened injury to them outweighs whatever harm the proposed injunction may cause the opposing party; and (3) the injunction, if issued, would not be adverse to the public interest. *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980)(preliminary injunction standard).

II. STANDING.

I pause briefly to address the issue of standing. Plaintiffs American Constitutional Law Foundation, Inc. (ACLF), Initiative and Referendum Institute (IRI) and Americans for Sound Public Policy (ASPP) are nonprofit organizations that support direct democracy and seek through lawsuits and other means to promote and "protect" citizen initiative and referendum processes throughout the United States. The Defendants urge dismissal of these Plaintiffs for lack of standing, claiming the ACLF was dissolved by operation of law effective January 1, 1998,[1] and therefore lacks the legal capacity to sue, and that the interests of the remaining institutional Plaintiffs in the matters at issue are insufficient to confer standing.

In response Plaintiffs offered only vague assertions that the institutional Plaintiffs have "members and supporters

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[1] Colo. Rev. Stat. § 7-26-111 governs the involuntary dissolution of corporations and provides that corporations suspended for the preceding three-year period "shall be dissolved by operation of law" without the necessity of any other action under this section. § 7-26-111(5).

in Colorado" and "intend to support future initiatives in Colorado." (Pls.' Am. Compl. at ¶¶ 12-14.) There is no allegation that the ACLF, IRI, ASPP or any of their individual members have been injured by Colorado's single-subject scheme or that they have even been involved in the particular initiatives at issue here. On this record, there is nothing from which the standing of ACLF, IRI or ASPP can be inferred or deduced. I conclude the institutional Plaintiffs lack standing to challenge Colorado's constitutional single-subject requirement or the title-setting process implementing it, and grant Defendants' motion to dismiss them from the case. My remaining findings and conclusions are directed to the individual Plaintiffs only.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. Background.

Colorado law allows its citizens to place issues on the ballot by petition. Colo. Const. art. V, § 1(1). The right is not unlimited, however, as the state constitution also grants the General Assembly wide authority to adopt legislation "designed to prevent fraud, mistake, or other abuses" in the process. *Committee for Better Health Care v. Meyer*, 830 P.2d 884, 893 (Colo. 1992) (en banc)(citing Colo. Const. art. V, § 1(2)(petitions shall be filed "in such form as may be prescribed pursuant to law") and art. VII, § 11 (granting general authority to regulate elections and citizens' right to elective franchise)).

Pursuant to this authority, the General Assembly has provided for a three-stage process for gaining access to the ballot. Colo. Rev. Stat. Ann. §§ 1-40-101 *et seq.* (Bradford

1997). First, proponents must submit a draft of the proposed measure petition to state legal and legislative offices for review and comment. *Id.*, § 1-40-105. Following a public hearing, the draft proceeds to the title board for preparation of a title, submission clause and summary. § 1-40-106, 107. The final stage includes the circulation process, a six-month period in which proponents must obtain a requisite number of qualified signatures and file the petition with the Secretary of State. *Id.*, §§ 1-40-108, 109. Petitions certified as having the requisite number of qualified signatures are included on the ballot in the next general election. § 1-40-122. The second stage of this process is at issue here.

Section 1(5.5), article V, of the Colorado Constitution provides that "no measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title." Colo. Const. art. V, § 1(5.5). If a measure contains "more than one subject such that no single subject can be clearly expressed in its title, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls" pending revision and resubmission. *Id.* Section 1(5.5) was referred by the General Assembly to the people of Colorado for their approval in 1994. *See* Colo. Rev. Stat. Ann. § 1-40-106.5. Its language was drawn from § 21 of the same article V, which subjects every bill prepared by the General Assembly, other than general appropriation bills, to the same limitation. *Id.*

To implement § 1(5.5), the General Assembly provided for the establishment of a title board charged with determining compliance with the single-subject requirement, summarizing the proposed amendment, setting the title, and drafting a submission clause. Colo. Rev. Stat. Ann. § 1-40-

106. In setting a title, the board must consider the public confusion that might be caused by misleading titles "and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes' or 'no' vote will be unclear." § 1-40-106(b). The board's actions are subject to rehearing and expedited appeal to the Colorado Supreme Court. Id., § 1-40-107. In any event, no petition for any initiative measure may be circulated before the title, submission clause and summary have been determined and fixed in accordance with these provisions.

B. Success on the Merits.

1. First Amendment Claim.

a. Level of Scrutiny.

Plaintiffs assert § 1(5.5) and the statutory title-setting procedures implementing it are subject to exacting scrutiny because they infringe on Plaintiffs' first amendment rights under the United States Constitution to petition for redress of grievances and to speak and associate freely for political ends.

Colorado's petition process has been the subject of several first amendment challenges in recent years and the law governing it is well established. The United States Supreme Court reviewed the process in *Meyer v. Grant*, 486 U.S. 414 (1988), invalidating a Colorado petition statute that criminalized the use of paid circulators. The Tenth Circuit recently applied *Grant* in reviewing several other Colorado petition laws, invalidating three which prescribed the qualifications and conduct of petition circulators and

upholding a fourth which required circulators to sign specifically described affidavits. *American Constitutional Law Found. v. Meyer*, 120 F.3d 1092 (10th Cir. 1997).

In *Grant*, the Supreme Court recognized that while the right of initiative is state-created, once a state confers such rights to its citizens, it must do so in a manner consistent with the protections afforded "core political speech" under the United States Constitution. *Grant*, 486 U.S. at 420-21, 424. Finding the "interactive communication concerning political change" inherent in the exchange between a petition circulator and the members of the public whose support he is soliciting, the Court agreed exacting scrutiny would apply to any law that chilled or restricted such communication. *Id.* at 421-22.

Plaintiffs invoke *Grant* to argue that Colorado's single-subject and title-setting procedures likewise limit their "core political speech" by inhibiting their ability to circulate their petitions. (Pls.' Supplemental Br. at pp. 12-14.) The assertion

belies a thoughtful reading of *Grant*[2] and ignores the Tenth Circuit's rejection of a similar argument in American.

After a comprehensive review of Supreme Court decisions on the subject, the Tenth Circuit in American concluded such a broad reading of *Grant* would "conflict with the general rule that states have the power to regulate their elections and access to their ballots." 120 F.3d at 1097 (citing *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1367 (1997)(syl. ¶ (a)("States may enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder") and *Storer v. Brown*, 415 U.S. 724, 730 (1974)("As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process")). A successful petition, the Court reasoned, results in a question being submitted to the voters and thus the petition process is

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[2] The speech at issue in *Grant* was the political discussions regarding the merits of a measure that had otherwise qualified for circulation. The Supreme Court determined Colorado's prohibition against the use of paid circulators restricted such speech by "limiting the number of voices who will convey [the proponents'] message . . . and, therefore, . . . the size of the audience [the proponents] can reach." *Grant*, 486 U.S. at 423. The single-subject requirement at issue in this case does not regulate the manner in which a qualified petition may be circulated nor the scope or substance of the political discussions that occur during that process. I agree with the Eleventh Circuit's distinction of *Grant* in *Biddulph v. Mortham*, 89 F.3d 1491, 1498 (11th Cir. 1996), and conclude that, "[a]bsent some showing that the initiative process substantially restricts political discussion of the issue [the proponent] is seeking to put on the ballot, [*Grant*] is inapplicable."

both "a ballot access vehicle, as well as an avenue for political expression." *Id.* Any reading of *Grant* that would subject every petition regulation to strict scrutiny because it limited a proponent's access to voters would "tie Colorado's hands in seeking to assure equitable and efficient elections on ballot issues." *Id.* Accordingly, the "more flexible" standard applicable to election laws generally should apply. *Id.* 120 F.3d at 1098 (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)(articulating standard), and *Timmons, supra*, at 1369-70).

Plaintiffs attempt to distinguish *American* by denying theirs is a "ballot access" case or that the election law cases upon which it is based apply. The denial is unavailing. The single-subject requirement is a precondition to be met before a proposed initiative will qualify for circulation, and ultimately, the ballot. Unlike *Grant*, the single-subject requirement neither targets the circulation process nor limits, in any way other than by limiting access to that process, the exchange of ideas that take place during circulation. As the Supreme Court stated in *Burdick*, "the mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates [or ballot measures][3] from which voters might

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[3] Plaintiffs offer no support for their assertion that a different standard applies to laws which regulate the placement of initiatives, rather than candidates, on the ballot. In fact, the law is to the contrary. The Tenth Circuit well before American equated the circulation process for proposed ballot initiatives and the nomination process for candidates, describing both as vehicles for qualifying for the ballot and stating affirmatively that the state's interest in regulating each is the same. *See Montero v. Meyer*, 861

choose . . . does not of itself compel close scrutiny.'" *Burdick*, 504 U.S. at 433-34 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

The Supreme Court has long recognized the tension between the unfettered rights of individuals to vote and to associate with others through the ballot on one hand, and states' rights to regulate their elections on the other. *Burdick*, 504 U.S. at 433 ("each provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends.'")(quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). The individual's right to vote and to associate through the ballot may be "fundamental," but it is not absolute. *Id.* (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1973)). "Common sense, as well as constitutional law, compel the conclusion that government

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F.2d 603, 607 (10th Cir. 1988); *Montero v. Meyer*, 13 F.3d 1444, 1449 (10th Cir.), *cert. denied*, 513 U.S. 886 (1994). Accordingly, the Tenth Circuit adopted the "flexible" standard applicable under Supreme Court precedent to election law challenges for consideration of similar challenges to petition laws. *American*, 120 F.3d at 1097. Accord *Biddulph*, 89 F.3d at 1500 (state's broad discretion in administering initiative process subject to strict scrutiny only in certain narrow circumstances such as where regulation is content based or has disparate impact on certain political viewpoints, or where facially neutral regulation is applied in a discriminatory manner or burdened the free exchange of ideas about the objective of a proposal as in *Grant*)(applied in *American*).

must play an active role in structuring elections." *Id.* (citing *Storer*).

Thus, the Supreme Court rejects the contention that every election law must be subjected to strict scrutiny simply because, at some level, it burdens the "right to associate with others for political ends." *Burdick*, 504 U.S. at 433-34 (doing so "would tie the hands of States seeking to assure that elections are operated equitably and efficiently"). The burdens of which Plaintiffs complain are nothing more than that and application of the "flexible" standard is therefore appropriate. *American*, 120 F.3d at 1098.

The "flexible" level of scrutiny applicable to state election laws was adopted by the Supreme Court in *Anderson. Burdick,* 504 U.S. at 434. Under this standard, courts must weigh the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against the "precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. "'Regulations imposing severe burdens must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" *American*, 120 F.3d at 1098 (quoting *Timmons*, 117 S. Ct. at 1370).

b. Magnitude and Character of Burden Imposed.

Applying the flexible standard, I must weigh the character and magnitude of the burden Colorado's single-subject title-setting scheme imposes on Plaintiffs' First Amendment rights against the interests the State contends justify that burden, considering the extent to which the State's interests make the burden necessary. *American* at 1098.

Colorado's interests in enacting the constitutional single-subject requirement are set forth in the legislative declaration accompanying the title-setting provisions at Colo. Rev. Stat. § 1-40-106.5. According to the declaration, § 1(5.5) was designed to "prevent or inhibit various inappropriate or misleading practices that might otherwise occur" without it, and the General Assembly's intent in referring § 1(5.5) to voters for approval was "to protect initiated measures and referred constitutional amendments from similar practices" in the future. Colo. Rev. Stat. § 1-40-106.5(d). Targeted practices included "the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits." § 1-40-106.5(e)(I). Also targeted is the use of "surreptitious measures" that fail to apprise voters of the subject of each measure by title, and therefore result in "surprise and fraud" being practiced upon voters. § 1-40-106.5(e)(II). As interpreted by the Colorado Supreme Court, the overall purpose of § 1(5.5) is to ensure that separate subjects depend on their own merits for passage, and not on the combined support of two or more subjects

proposed together. *Matter of Proposed Initiative* 1996-17, 920 P.2d 798 (Colo. 1996); *In re Title, Ballot Title & Submission Clause,* 907 P.2d 586 (Colo. 1995).

Plaintiffs claim the State's expressed intent is "paternalistic" and an "illegitimate state government concern." (Pls.' Supplemental Br. at p. 22.) Plaintiffs invoke the "Declaration of Independence" and the Colorado Constitution to argue that "the people are the source of all legitimate political power" and that, "if the people themselves are incompetent to self-govern, there is nothing but illogic in trusting the government they selected to be more competent than they are." *Id.* Plaintiffs' polemic is with the republican form of government generally, not the specific exercise of it in this case. Moreover, representative democracy is the form of government adopted by the United States Constitution on which Plaintiffs' claims are based ; the "illogic" (not to mention irony) here is with Plaintiffs' use of the Constitution as a springboard to invalidate § 1(5.) "because" it was enacted by citizen representatives, rather than the citizens directly. Plaintiffs' entreaty to direct democracy and a new form of government must find its audience somewhere other than the courts which are bound to uphold the existing one.

Plaintiffs' less derisive (and more salient) argument is that the single-subject requirement imposes "severe" burdens on their rights of expression and access which cannot be justified by the interests stated.[4] These burdens include the

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[4] Plaintiffs also claim the single-subject requirement burdens their "fundamental right" under the Petition Clause to petition the government for redress of grievances. (Pls.'

censorship of their speech and their inability, in light of repeated single-subject challenges to their proposed measures, to gain access through the circulation process to the public and, ultimately, the ballot. The evidence and arguments presented at trial convinced me that both burdens, to the extent they were demonstrated at all, are *de minimis* and not of a character or magnitude to warrant the invalidation of Colorado's single-subject scheme under a strict scrutiny standard.

Plaintiffs offer no reasoned explanation for how Colorado's generally applicable and facially neutral single-subject requirement allows the state to "censor" their political speech or "dictate the content" of their ballot proposals. Plaintiffs contend the board's ability to set a measure's title contrary to the wishes of its proponent allows the board to define the proponent's message to the voters. The contention

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Supplemental Br. at pp. 12-14.) The assumption inherent in this claim, namely, that the "entire [state initiative] process involves a petition for redress" within "the plain language of the First Amendment," is wholly unsupported and unpersuasive. The Eleventh Circuit rejected this same argument in *Biddulph*, questioning the relevance to the voter initiative process of the right protected under the First Amendment "to make wishes and interests known to government representatives," particularly given the purpose of the former is for citizens to enact change by "bypassing their representatives altogether." 89 F.3d at 1497, n.4. Citing the work of several scholars in the area, the Court went on to conclude that state initiative processes do not involve the sort of petitioning guaranteed by the Petition Clause. *Id.* I agree with the Eleventh Circuit and dismiss Plaintiffs' Petition Clause argument out of hand.

is perfervid. Measures are not circulated by title alone, but in their entirety, as drafted by their proponents, with no limit or restriction on the message or discussions that ensue. It is Plaintiffs who argue the intelligence and vigilance of voters is such that they can discern the nuances of a "complex initiative" without the need for a title at all. Plaintiffs tread a fine line now to argue their ability to discuss their political message freely is burdened by these same voters' refusal, or inability, to look beyond the title to the content below it.

It seems obvious that Plaintiffs' complaint is with the prohibition against circulation of multi-subject measures generally, not the title board's authority to fix a title to a measure that complies. That complaint, premised on the assertion that Colorado is without authority to limit the form of initiatives in any way that acts as a barrier to circulation, was squarely rejected by the Tenth Circuit in American. Colorado is not required to maintain a petition process that allows unfettered access to the ballot or, in this case, to the circulation process that precedes it. *See American*, 120 F.3d at 1097. The single-subject requirement is content-neutral and generally applicable. Proponents are free to propose changes to myriad subjects by initiative, as long as separate proposals are submitted for each subject. This limitation is content-neutral and generally applicable. The burdens it imposes on Plaintiffs' First Amendment rights are neither of a character nor magnitude to warrant strict scrutiny.

Next, Plaintiffs assert that the adversarial nature of Colorado's title-setting process severely burdens their ability to express themselves because it allows Plaintiffs' opponents to delay, and even thwart entirely, the circulation of Plaintiffs' petitions through repeated single-subject challenges.

Only Campbell, Hayes, Hamilton, and Bruce offered testimony at trial or at the preliminary injunction hearing in this regard. Campbell, Hayes and Hamilton testified about ballot initiatives they have sponsored in the past which failed as a result of single-subject challenges. Campbell, Hayes and Bruce also testified about various existing initiatives they hope to place on the election ballot this November, which are also being delayed by single-subject challenges brought by their opponents.[5] Plaintiff Bruce testified that he and Plaintiff Wright have submitted over 12 versions of their proposed Initiative # 30 since August 1997, and that none has made it through the title-setting process.

The evidence and testimony taken at trial do not support the conclusion that the structure of Colorado's initiative process is unconstitutional or that the single-subject challenges for which it provides severely burden Plaintiffs'

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[5] Campbell's Initiative # 64 proposes substantial changes to existing constitutional and statutory provisions governing the selection of state court judges and the manner and duration for which they may serve. It was recently returned to Campbell at the direction of the Colorado Supreme Court, which found the Initiative encompassed multiple subjects in violation of § 1(5.5) of Article V and struck the title and summary set by the Title Board. *See Aisenberg v. Campbell*, 1998 WL 343462 (Colo. June 22, 1998)(not yet released for publication). A single-subject challenge to Hayes's Initiative # 74 for the assessment of school impact fees on newly constructed housing units is presently on review by the Colorado Supreme Court (Pls.' Ex. 6), as is a challenge to Initiative # 30, proposed by Plaintiffs' Bruce and Wright, for a constitutional amendment imposing a series of tax and franchise charge cuts. (Pls.' Ex. 7.)

first amendment rights. The challenge to Campbell's Initiative # 64, for example, was filed in March 1998 immediately after the title board had set its title, when both Campbell and his opponent filed motions for rehearing. *Aisenberg*, 960 P.2d 1192, 1998 WL 343462 at *1. Based on the Supreme Court's recitation of the facts, the title board acted promptly, issuing an order granting both motions in part and denying them in part within two weeks. *Id.* Campbell's opponent filed a petition for review on April 6, 1998, and the Colorado Supreme Court issued its written opinion, together with a written dissent, on June 22, 1998. Charts and other statistical data submitted by Defendants at trial demonstrated that prompt review by the board and the Supreme Court is the rule, rather than the exception. In addition, I agree with Defendants that the frustration Plaintiffs Bruce and Wright have experienced at their inability to see Initiative # 30 through the title-setting process is less a function of a system gone awry than of their refusal, which Plaintiff Bruce candidly acknowledged at trial, to change the proposal's language in any significant way during the course of the 12 submissions.

Regardless of the manner in which Plaintiffs have framed their constitutional challenge on paper, the gravamen of Plaintiffs' complaint is not with the structure of Colorado's title-setting process but with specific decisions of the Colorado Supreme Court rejecting their initiatives on single-subject grounds. I pause briefly to address this aspect of Plaintiffs' case, because it provides a basis for what otherwise may be too easily dismissed as the invective of dissidents.

In their filings and in their testimony at trial, Plaintiffs referred to several Supreme Court cases which they claim

target initiatives based on the unpopularity of their proponents and their message. I have reviewed many of these cases. While ultimately I agree with Defendants that the Supreme Court's interpretation and application of § 1(5.5) in individual cases is beyond my purview in the absence of a discernible pattern or practice of illicit discrimination (which I find has not been shown), I also agree that these cases provide a substantial basis for Plaintiffs' trepidation. The *Aisenberg* decision clearly illustrates Plaintiffs' point.

While the title-setting process itself provided for a prompt resolution of the single-subject challenge lodged against Initiative # 64's provisions affecting the Colorado judiciary, the majority's determination in *Aisenberg* that the Initiative contained multiple subjects demonstrated a mincing and parsing of § 1(5.5) contrary to the stated purpose of the single-subject requirement and previous admonitions of the Court concerning its proper construction. One of the principle purposes of § 1(5.5) is to inhibit the practice of putting together in one measure subjects having "no necessary or proper connection" for the purpose of enlisting in support of the measure the advocates of each. Colo. Rev. Stat. § 1-40-106.5. As the dissent of Justices Kourlis and Bender acknowledged, the Colorado Supreme Court is "bound to construe the single-subject requirement liberally to preserve and protect the right of initiative and referendum." *Aisenberg*, 1998 WL 343462 at *10 (Kourlis, J. and Bender, J dissenting)(citing *In re Proposed Initiative on Parental Choice in Education*, 917 P.2d 292, 294 (Colo. 1996)). I agree with the *Aisenberg* dissent as well as the Plaintiffs in this case that the majority's decision does not conform to this mandate.

Nevertheless, my concern here is with Plaintiffs' stated challenge to Colorado's petition process and to the constitutionality of the single-subject requirement specifically. Applying the "flexible" standard set forth in *American*, I conclude the burdens to first amendment rights of which Plaintiffs complain are not severe and do not trigger strict scrutiny. Rather, the burdens of delay and lack of access to the circulation process established by Plaintiffs are of a character and magnitude triggering less exacting review. Because Colorado has an important regulatory interest in ensuring that ballot measures depend on their own merits for passage rather than the combined merits of unrelated subjects contained within them, as well as in preventing and inhibiting voter fraud and surprise, I conclude the burdens imposed by Colorado's content-neutral and generally applicable single-subject requirement are justified. Accordingly, I reject the contention that § 1(5.5), art. V, of the Colorado Constitution violates Plaintiffs' rights under the First Amendment of the United States Constitution.

2. Equal Protection.

Alternatively, Plaintiffs claim Colorado's title-setting process discriminates against citizen proponents of ballot measures in violation of the Fourteenth Amendment's Equal Protection Clause. The claim is a shot in the dark that misses its mark.

The title-setting provisions of § 1-40-106 and 107 establish an adversarial process through which citizen-initiated ballot measures may be subjected to a single-subject challenge before being released for circulation. No such process exists for measures referred to voters by the General Assembly,

which may be challenged in court for single-subject compliance only after they have been approved by voters. *Polhill v. Buckley*, 923 P.2d 119, 120 (Colo. 1996)(Colorado Supreme Court lacked subject matter jurisdiction to review legislative referendum for compliance with single-subject requirement unless and until approved by voters). Plaintiffs claim this disparate treatment of citizen-initiated and legislatively referred measures is discriminatory.

The Equal Protection Clause provides that no state may "deny to any person within its jurisdiction the equal protection of the Laws." U.S. Const. Amend. XIV. A denial occurs when the state treats similarly situated individuals differently without justification. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Unless it impinges upon a fundamental right, a classification based neither on race, sex nor national origin, and for which there is a rational basis, does not violate the Equal Protection Clause. *May v. Town of Mountain Village*, 132 F.3d 576, 580 (10th Cir. 1997)(applying *Harris v. McRae*, 448 U.S. 297, 322 (1980)).

Although worded differently, Plaintiffs' constitutional challenge is analytically the same under either theory of relief. *See American*, 120 F.3d at 1100 (when a statute allegedly limits the speech of some but not others, "the principles of equal protection and free speech are intertwined"). Both theories turn on the contention that Colorado's single-subject requirement and title-setting process impinge on Plaintiffs' "fundamental rights." I have already determined the process does not do so. An election process deemed not to impinge on free speech rights sufficiently to warrant the application of strict scrutiny under a first amendment analysis cannot thereafter be deemed to impinge on a "fundamental right"

warranting strict scrutiny under an equal protection analysis. *C.f. American*, 120 F.3d at 1100 (because requirement that only registered voters may circulate petitions excluded group of persons from participating in "core political speech," it was unconstitutional under both a first amendment and an equal protection analysis). Accordingly, and because I have already determined that Colorado can articulate a rational basis for it, the differential treatment of which Plaintiffs complain does not violate the Equal Protection Clause.

Plaintiffs' equal protection claim, however, fails for an even more fundamental reason. A threshold requirement for challenging a state's decision to treat different people differently is that those people are similarly situated. *Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998)(to state viable equal protection claim, plaintiffs must first make a threshold showing that they were treated differently from others who were similarly situated to them). Otherwise, there is no basis for comparison and the state's action cannot be said to be discriminatory.

Any assertion that individual citizens and their elected representatives are similarly situated with respect to their lawmaking function under the state constitution is fundamentally flawed. The argument, as the Oklahoma Supreme Court observed in its review of a challenged initiative petition, "quite simply mixes apples and oranges." *In re Initiative Pet'n No. 349*, 838 P.2d 1, 11 (Okla. 1992).
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The legislative and initiative processes are entirely different. The initiative process is primarily a private activity. Public participation in the drafting process, other than by the title board under the title-setting procedures being challenged,

is minimal. *See Montero v. Meyer*, 861 F.2d at 609-10. The legislative process, by contrast, is public. Built into this process are layers of review for constitutional compliance which the initiative process lacks. A legislatively referred measure, for example, is sponsored and introduced by an individual who was elected by the citizenry. It is subjected to debate and amendment by a body of similarly elected representatives. Even if a measure survives committee consideration and is passed by both houses, it is subject to veto by the governor. *See In re Initiative Pet'n No. 349*, 838 P.2d at 11 (contrasting initiative and legislative processes in Oklahoma). The General Assembly and citizen proponents of initiatives are not similarly situated; ipso facto equal protection analysis does not apply.

C. Remaining Lundgrin Factors.

Plaintiffs' failure to prevail on the merits of either constitutional theory of relief renders consideration of the remaining *Lundgrin* factors unnecessary. Plaintiffs are suffering no present or threatened constitutional injury and thus no present basis for injunctive or declaratory relief exists. *See Libertarian Party v. Buckley*, __ F. Supp. __, 1998 WL 347154 at *4 (D. Colo. 1998).

IV. CONCLUSION.

The burdens imposed by Colorado's requirement that proposed ballot initiatives be limited to a single subject clearly expressible in its title are justified under the "flexible" scrutiny standard applicable to Plaintiffs' challenge under *American*. Colorado has an important regulatory interest in ensuring that proposed ballot measures depend on their own

merits for passage and in preventing and inhibiting the use of inappropriate or misleading practices that might otherwise occur. The single-subject scheme is content-neutral and Plaintiffs' claims that it is being discriminatorily applied to them are unsupported by the evidence.

The fact that legislatively referred measures are not subject to review for single-subject compliance before they are submitted to voters does not compel the conclusion that different treatment of citizen-based initiatives violates Plaintiffs' equal protection rights. Plaintiffs and the General Assembly are not similarly situated in terms of their lawmaking functions and even if they were, there are valid reasons for subjecting the essentially private citizen initiative process to review for single-subject compliance before a proposed measure is circulated to voters. I conclude the single-subject requirement of § 1(5.5), art. V, of the Colorado Constitution, and the statutory title-setting procedures implementing it, neither violate Plaintiffs' free speech or associational rights under the First Amendment, nor do they discriminate against Plaintiffs in violation of the Fourteenth Amendment's Equal Protection Clause. Judgment and costs for Defendants.

Dated this 4 day of August, 1998, at Denver, Colorado.

/s/_____
JOHN L. KANE, JR.
U.S. SENIOR DISTRICT COURT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed: March 17, 2000]

No. 98-1329

DOUGLAS CAMPBELL, RICHARD HAMILTON, CLYDE HARKINS, JACK HAWKINS, DANIEL HAYES, GARY SWING, JEFFREY WRIGHT, DOUGLAS BRUCE, THE INITIATIVE AND REFERENDUM INSTITUTE, AMERICANS FOR SOUND PUBLIC POLICY, and the AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.,
Plaintiffs - Appellants,

v.

VICTORIA BUCKLEY, in her official capacity as Secretary of State for the State of Colorado and member of the Colorado State Initiative and Referendum Title Board, COLORADO STATE INITIATIVE AND REFERENDUM TITLE BOARD, and RICHARD WESTFALL and REBECCA LENNAHAN in their official capacities

as Title Board members,)
Defendants - Appellees.)
)

Before **BRISCOE, REAVLEY***, and **MURPHY**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

PATRICK FISHER, Clerk of Court

/s/_____
by: Audrey F. Weigel
Deputy Clerk

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* Honorable Thomas M. Reavley, United State Senior Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX E

CONSTITUTIONS AND STATUTES

U. S. Const., amend. I

Congress shall make no law ... abridging freedom of speech ... or the right of the people ... to petition the Government for a redress of grievances.

U. S. Const., amend. XIV, Section 1

... [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article V, Sec. 1, Colo. Const

(5) The original draft of the text of proposed initiated constitutional amendments and initiated laws shall be submitted to the legislative research and drafting offices of the general assembly for review and comment. No later than two weeks after submission of the original draft, unless withdrawn by the proponents, the legislative research and drafting offices of the general assembly shall render their comments to the proponents of the proposed measure at a meeting open to the public, which shall be held only after full and timely notice to the public. Such meeting shall be held prior to the fixing of a ballot title. Neither the general assembly nor its committees or agencies shall have any power to require the amendment, modification, or other alteration of the text of any such

proposed measure or to establish deadlines for the submission of the original draft of the text of any proposed measure.

(5.5) No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls. In such circumstance, however, the measure may be revised and resubmitted for the fixing of a proper title without the necessity of review and comment on the revised measure in accordance with subsection (5) of this section, unless the revisions involve more than the elimination of provisions to achieve a single subject, or unless the official or officials responsible for the fixing of a title determine that the revisions are so substantial that such review and comment is in the public interest. The revision and resubmission of a measure in accordance with this subsection (5.5) shall not operate to alter or extend any filing deadline applicable to the measure.

Section 1-40-105, C.R.S. (1999)

Filing procedure - review and comment - amendments - filing with secretary of state

(1) The original typewritten draft of every initiative petition for a proposed law or amendment to the state constitution to be enacted by the people, before it is signed by any elector, shall be submitted by the proponents of the petition to the directors of the legislative council and the office of legislative legal services for review and comment. Proponents are encouraged

to write such drafts in plain, nontechnical language and in a clear and coherent manner using words with common and everyday meaning which are understandable to the average reader. Upon request, any agency in the executive department shall assist in reviewing and preparing comments on the petition. No later than two weeks after the date of submission of the original draft, unless it is withdrawn by the proponents, the directors of the legislative council and the office of legislative legal services, or their designees, shall render their comments to the proponents of the petition concerning the format or contents of the petition at a meeting open to the public. Where appropriate, such comments shall also contain suggested editorial changes to promote compliance with the plain language provisions of this section. Except with the permission of the proponents, the comments shall not be disclosed to any person other than the proponents prior to the public meeting with the proponents of the petition.

(2) After the public meeting but before submission to the secretary of state for title setting, the proponents may amend the petition in response to some or all of the comments of the directors of the legislative council and the office of legislative legal services, or their designees. If any substantial amendment is made to the petition, other than an amendment in direct response to the comments of the directors of the legislative council and the office of legislative legal services, the amended petition shall be resubmitted to the directors for comment in accordance with subsection (1) of this section prior to submittal to the secretary of state as provided in subsection (4) of this section. If the directors have no additional comments concerning the amended petition, they may so notify the proponents in writing, and, in such case, a hearing on the amended petition pursuant to subsection (1) of this section is not required.

(3) To the extent possible, drafts shall be worded with simplicity and clarity and so that the effect of the measure will not be misleading or likely to cause confusion among voters. The draft shall not present the issue to be decided in such manner that a vote for the measure would be a vote against the proposition or viewpoint that the voter believes that he or she is casting a vote for or, conversely, that a vote against the measure would be a vote for a proposition or viewpoint that the voter is against.

(4) After the conference provided in subsections (1) and (2) of this section, a copy of the original typewritten draft submitted to the directors of the legislative council and the office of legislative legal services, a copy of the amended draft with changes highlighted or otherwise indicated, if any amendments were made following the last conference conducted pursuant to subsections (1) and (2) of this section, and an original final draft which gives the final language for printing shall be submitted to the secretary of state without any title, submission clause, summary, or ballot title providing the designation by which the voters shall express their choice for or against the proposed law or constitutional amendment.

Section 1-40-106, C.R.S. (1999)

Title board - meetings - summary, titles, and submission clause

(1) For ballot issues, beginning with the first submission of a draft after an election, the secretary of state shall convene a title board consisting of the secretary of state, the attorney general, and the director of the office of legislative legal services or the director's designee. The title board, by majority vote, shall proceed to designate and fix a proper fair title for each proposed law or constitutional amendment, together with a submission clause, at public meetings to be held at 2 p.m. on

the first and third Wednesdays of each month in which a draft or a motion for reconsideration has been submitted to the secretary of state. To be considered at such meeting, a draft shall be submitted to the secretary of state no later than 3 p.m. on the twelfth day before the meeting at which the draft is to be considered by the title board. The first meeting of the title board shall be held no sooner than the first Wednesday in December after an election, and the last meeting shall be held no later than the third Wednesday in May in the year in which the measure is to be voted on.

* * *

(3)(a) The title board shall prepare a clear, concise summary of the proposed law or constitutional amendment. The summary shall be true and impartial and shall not be an argument, nor likely to create prejudice, either for or against the measure. The title board may request assistance in the preparation of the summary from the legislative council and, if, in the opinion of the title board, the proposed law or constitutional amendment will have a fiscal impact on the state or any of its political subdivisions, shall request assistance in such matter from the office of state planning and budgeting or the department of local affairs. When the title board requests fiscal impact information from the office of state planning and budgeting or the department of local affairs, the fiscal impact information shall be filed with the secretary of state by 12 noon on the Friday before the meeting of the title board at which the draft is to be considered. The legislative council, the office of state planning and budgeting, and the department of local affairs shall furnish any assistance requested, and the summary shall include an estimate of any such fiscal impact, together with an explanation thereof.

(b) In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes" or "no" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title, submission clause, and summary, shall be completed within two weeks after the first meeting of the title board. Immediately upon completion, the secretary of state shall deliver the same with the original to the parties presenting it, keeping the copy with a record of the action taken thereon. Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered "yes" (to vote in favor of the proposed law or constitutional amendment) or "no" (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.

Section 1-40-106.5, C.R.S. (1999)

Single-subject requirements for initiated measures and referred constitutional amendments - legislative declaration

(1) The general assembly hereby finds, determines, and declares that:

(a) Section 1 (5.5) of article V and section 2 (3) of article XIX of the state constitution require that every constitutional amendment or law proposed by initiative and every constitutional amendment proposed by the general assembly be limited to a single subject, which shall be clearly expressed in its title;

(b) Such provisions were referred by the general assembly to the people for their approval at the 1994 general election pursuant to Senate Concurrent Resolution 93-4;

(c) The language of such provisions was drawn from section 21 of article V of the state constitution, which requires that every bill, except general appropriation bills, shall be limited to a single subject, which shall be clearly expressed in its title;

(d) The Colorado supreme court has held that the constitutional single-subject requirement for bills was designed to prevent or inhibit various inappropriate or misleading practices that might otherwise occur, and the intent of the general assembly in referring to the people section 1 (5.5) of article V and section 2 (3)of article XIX was to protect initiated measures and referred constitutional amendments from similar practices;

(e) The practices intended by the general assembly to be inhibited by section 1 (5.5) of article V and section 2 (3) of article XIX are as follows:

(I) To forbid the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits;

(II) To prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon voters.

(2) It is the intent of the general assembly that section 1 (5.5) of article V and section 2 (3) of article XIX be liberally construed, so as to avert the practices against which they are aimed and, at the same time, to preserve and protect the right of initiative and referendum.

(3) It is further the intent of the general assembly that, in setting titles pursuant to section 1 (5.5) of article V, the initiative title setting review board created in section 1-40-106 should apply judicial decisions construing the constitutional single-subject requirement for bills and should follow the same rules employed by the general assembly in considering titles for bills.

Section 1-40-107, C.R.S. (1999)
Rehearing - appeal - fees - signing

(1) Any person presenting an initiative petition or any registered elector who is not satisfied with the titles, submission clause, and summary provided by the title board and who claims that they are unfair or that they do not fairly express the true meaning and intent of the proposed state law or constitutional amendment may file a motion for a rehearing with the secretary of state within seven days after the titles and summary are set. The motion for rehearing shall be heard at the next regularly scheduled meeting of the title board; except that, if the title board is unable to complete action on all matters scheduled for that day, consideration of any motion for rehearing may be continued to the next available day, and except that, if the titles and summary protested were set at the last meeting in May, the motion shall be heard within forty-eight hours after the motion is filed.

(2) If any person who filed a motion for a rehearing pursuant to subsection (1) of this section is overruled by the title board, then the secretary of state shall furnish such person, upon request, a certified copy of the petition with the titles, submission clause, and summary of the proposed law or constitutional amendment, together with a certified copy of the motion for rehearing and of the ruling thereon. If filed with the

clerk of the supreme court within five days thereafter, the matter shall be disposed of promptly, consistent with the rights of the parties, either affirming the action of the title board or reversing it, in which latter case the court shall remand it with instructions, pointing out where the title board is in error.

(3) The secretary of state shall be allowed a fee which shall be determined and collected pursuant to section 24-21-104 (3), C.R.S., for certifying a record of any proceedings before the title board. The clerk of the supreme court shall receive one-half the ordinary docket fee for docketing any such cause, all of which shall be paid by the parties desiring a review of such proceedings.

(4) No petition for any initiative measure shall be circulated nor any signature thereto have any force or effect which has been signed before the titles, submission clause, and summary have been fixed and determined as provided in section 1-40-106 and this section.

(5) In the event a motion for rehearing is filed in accordance with this section, the period for filing a petition in accordance with section 1-40-108 shall not begin until a final decision concerning the motion is rendered by the title board or the Colorado supreme court; except that under no circumstances shall the period for filing a petition be extended beyond three months prior to the election at which the petition is to be voted upon.

(6) The summary of any proposed initiated law or constitutional amendment shall be included in the publication of measures by the secretary of state pursuant to article XXIII of the state constitution.